Attachment A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
IN BANKRUPTCY

In Re.

SUNNYSIDE COAL COMPANY,

Debtor's Motion to Discontinue Retiree Benefits and Objections Thereto

94 12794 CEM

Courtroom C
721 19th Street
U.S. Customs House
Denver, Colorado 80202-2508

July 29, 1994

BEFORE THE HONORABLE CHARLES E. MATHESON, Judge.

APPEARANCES:

For the Debtor: Risa Wolf-Smith, Esq.

Also Present: Joan Burleson, Esq.
Rubner & Kutner
303 E. 17th Ave.
Denver, Colorado 80203

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT: Let me just deal with the last point. Under 1114(d), it is provided that the Court, upon a motion by any party-in-interest and after notice and hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the recovery benefits or if the Court otherwise determines that it is appropriate to serve as the authorized representative. I'm not quite so sanguine that this Court does not have the authority sua sponte to determine that the union is not the proper authorized representative and that a committee ought to be so formed. But, that's beside the point as far as this is concerned.

Let me say at the outset that--I said when we first convened this hearing that there was undoubtedly some risk that I would continuously refer to the debtor as Kaiser. I know that I've done that periodically. The Sunnyside Coal is a successor to another debtor in this Court; a successor in the sense that Sunnyside acquired from Kaiser the particular mine in Utah which it has operated. I mentioned Kaiser this morning because the observation has been made that in the course of the administration of that estate this Court had the opportunity to deal with in one form or another just about every new threshold legal issue that can arise in a reorganization proceeding. And, we did, indeed, deal with it. We didn't deal with this one. So, I suppose it is

fitting that the intricacies of 1114 and the impact of the Coal Act come back to me like Marlee's ghost to haunt me in the Sunnyside case like the specter of Kaiser as the Christmas Past to be dealt with.

As an academic exercise, it is a very interesting one. As an exercise involved with human pathos, it is charged with that, as well, although not quite to the same degree as we saw in the Kaiser Coal case, because at that time, there was not a similar kind of provision as the Coal Act and there was not a mandate that the retiree benefits be paid in any way. There wasn't any money with which to pay the retiree benefits in Kaiser Coal, a circumstance which has led the unions to seek the further modification of 1114 before Congress to require lenders to fund retiree health benefits in a reorganization proceeding; an effort, one of the few, I would guess, that the unions have at least, thus far, found to be fruitless. But, I'm sure they will persevere in their efforts.

Be that as it may, the case that we have before us today, the facts would show that Sunnyside as the successor to Kaiser in the operations of this particular mine did fall under the ambit of the 1988 Bituminous Coal Wage Agreement which is Debtor's Exhibit 1. And, while that agreement has since terminated, there are subsequent agreements; and, while the debtor has maintained consistently the argument that it

believes that it is not bound by the subsequent agreements, I disagree. The 1993 interim agreement provides explicitly that the employer in the agreement and the union agree to be bound by and comply fully with the terms and conditions of the successor national agreement. And, while it does specify that the parties intended to sign such an agreement, I can't find that the failure of that to have occurred has served to release those obligations and, indeed, I have no doubt, whatsoever, that had Sunnyside been hit by a wildcat strike by the union employees, it would have been the first to argue while it was operating under that interim agreement that the union was bound by the terms of the successor agreement and could not go out on such a wildcat strike. Further, it is clear that the company to its credit has continued to comply with the terms of that agreement on its operation and in the utilization of the employees. So, just in case that issue is thought to be important in the resolution of the matter that's before the Court, at least for purposes of today, the Court finds that the debtor is indeed party to the successor agreement and bound to the terms of that agreement.

The agreement, that successor agreement--the 1988 agreement and the successor agreement make provision for the payment of health benefits to retirees and Sunnyside comes to the Court under Section 1114 of the Bankruptcy Code seeking to terminate the obligation to pay retiree benefits. If

that's all that we have on the plate, it would be enough, but it isn't.

The union lobbied for and obtained additional legislation represented by the Coal Act hidden away in the recesses of the Internal Revenue Code. Section 9711 of Title 26 to the United States Code places a burden--I mean, it's always wonderful to read the language as it comes to us out of the Internal Revenue Code. It's almost unintelligible. "The last signatory operator of any individual," I mean it sounds like indentured servitude--"of any individual who as of February 1, 1993, is receiving retiree health benefits from an individual employer plan maintained pursuant to 1978 or subsequent Coal Wage Agreement, the last signatory operator shall continue to provide health benefits coverage to such individual which is substantially the same as the coverage provided by the plan as of January 1, 1992." And, there is no suggestion, no argument made that part of the filing of the bankruptcy petition, Sunnyside was obligated under that statutory mandate to provide retiree benefits.

Mr. Gillman argues that really--and, Mr. Smith--that 9711(a) of the Internal Revenue Code is all predicated on a voluntary agreement. If they didn't have the voluntary agreement in place, if there is such a thing as a coal mine in this country operated on a non-union basis, that operation would not be subject to the provisions of 9711 if it had not

instituted its own voluntary plan to provide retiree benefits. Even that kind of an operator would be subject to 9711 if it had a voluntary plan of its own in effect, it would appear, as of February 1, 1993. It would be required under 9711 to continue that plan. Had Congress thought that it was sufficient to have voluntary plans, then it wouldn't have been necessary to have 9711. Congress could have gone further, I suppose, and specified that every operator of a coal mine shall have a plan, but Congress didn't do that. Congress did, it is true, limit the obligation to maintain to continue to provide retiree benefits to those employers who already had a voluntary plan in place. But, Congress found some need to be sure that such an employer would not terminate that voluntary plan at some time in the future, either on its own or by complicity with a bargaining representative.

It's always difficult to divine the public policy behind legislation, such as the Coal Act, but it's certainly --this kind of legislation is certainly consistent with the view of Congress that the coal industry is certainly a more dangerous workplace than the courtroom. Well, maybe not. But, generally, it is less injurious to your health to be in the courtroom than it is in a coal mine and the health problems of coal miners and the costs and care required to provide for them can be considered perhaps to be a national

problem to the point where Congress felt it necessary to mandate that employers will continue to have health benefit plans in effect for retirees.

And, certainly, 9711 by its terms does not suggest that those obligations imposed by that statute shall be maintained, unless and until, the employer and the union agree to change it. I could certainly see the possibility that for a given mine operation, in bargaining for benefits, et cetera, considering the depressed coal prices, whatever, that the union might decide that it is better for the employees of that employer to accept lower wages and reduce health benefits in exchange for the opportunity to continue to have jobs and keep the mine open. After all, what's what collective bargaining is all about. But, 9711 would remove that opportunity from the union.

The debtor argues that 1114 provides that vehicle. The evidence that we have is that once the bankruptcy petition was filed, Sunnyside ceased or had ceased active mining operations. It was in the process of closing down the mine and indeed, by May, had shut off the power and allowed the mine to fill; thereby, foreclosing any possibility of reopening the mine and conducting operations. It does not intend to again engage in active coal mining. It intends to proceed within the context of a liquidating plan; to sell its remaining assets, preserve and protect, and care for them,

and pending that, comply with its environmental obligations to reclaim environmental damage done to the land by reason of its operations. And, to take whatever it receives out of the liquidation of those assets and out of the expenses and distribute that among the creditors.

Now, this Court has prodded on several occasions the debtor as to why it is here, why it is in Chapter 11, and the answer that I got is altruism. That's the answer I got. And, I've found in the course of human events that altruism is not usually a very reliable motivation; at least, on an ongoing basis. But, it is admirable when it exists and certain it is that it is desirable in this proceeding to maximize the possibility of return to the creditors, all the creditors; to retirees, the trade creditors, the secured creditors, the taxing authorities, everyone. And, I have no question, whatsoever, of the representations made that Mr. Burnham and the debtor believe that they're in a position to achieve that kind of a return that would be significantly in excess of what could be received in Chapter 7. I think that's an honest belief. And, indeed, it may very well be a justifiable belief. I still have this residual question that perhaps I ought not to have as to why they are motivated to do so. But, if it is only altruism, as I say, the goal that they seek to achieve is laudable and worthwhile and ought not to be lightly rejected. And, I say that in large part

because I don't want there to be some lingering thought at this stage of this proceeding that my view is that this debtor ought not to be in Chapter 11 and that the case ought to be converted. Certainly, the creditors' committee has actively supported the concept of allowing this debtor to remain in Chapter 11 and to be able to move forward with a plan. I think that with all due regards to Judge Scholl and his opinion, even he has to recognize in that opinion that Ms. LyBurski tendered me that it is well-established that a liquidating plan is a plan of reorganization and it can be pursued and fulfilled as a part of Chapter 11. There isn't anything in Chapter 11 that says that reorganization means sending the company back out into the world with an ability to generate a profit.

Now, there are lots of issues to be dealt with and they are significantly interrelated. Perhaps, in order that the parties can focus on how I'm getting to where I'm going, the parties ought to know up front where I'm going to get to. Having considered the evidence, reviewed the briefs that have been filed--and, as usual in this kind of case, the legal work has been of the highest quality--reviewed those briefs, reviewed the exhibits, heard the testimony, considered the provisions of Section 1114 of the Code, and for purposes which I'm about to explain, I will deny the debtor's application. I suspect that comes as a surprise in some

quarters.

I do that for a variety of reasons. First of all, setting aside the impact of the Coal Act, I think Mr. LyBurski is correct that the debtor has not made the showing required, particularly by the provisions of 1114(g)(1). That is, that the debtor has prior to the hearing made a proposal that fulfills the requirements of (f) which requires the debtor to make a proposal which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors to the debtor and all of the affected parties are treated fairly and equitably.

The proposal put forth by the debtor was unequivocal and a one-liner that the debtor will terminate the payment of health care benefits to the retirees, period. To be sure, the termination of those benefit payments will enhance the ultimate payout to creditors. Anything that the debtor does not have to pay to or for and on account of retirees, leaves more money in the debtor's pocket. So, it enhances the return. But, there has been nothing to show me that it is necessary to terminate all of those benefits in order to permit the reorganization. If they are paid for a shorter period of time, if they are paid in a lesser amount, if they're provided in a different way that is less expensive, any of those factors might serve to be considered

by the union and by the Court and might still permit the reorganization. It is a proposal that must be made to the authorized representative by the debtor. That is the proposal that the debtor must make. I understand that the debtor may wish to invite negotiation, but--and to do so from the farthest pole position, but nonetheless, it is ultimately the obligation of the debtor to come forth with the proposal to the authorized representative that this is what we must do in order to make it necessary to permit the reorganization. So, I find that that has not been done.

I further find that the debtor has not met the showing required under 1114(g)(2); that is, that the union as the authorized representative of the retirees has refused to accept such proposal without good cause. Now, I'm obviously bothered by the role of the union as the authorized representative because I think that the union clearly wears two hats, and when it puts on one, it necessarily acts to the detriment of its position when it puts on the other. I think that any reasonable group of people who are told that, look, you can get your retiree benefits on an ongoing basis from a fund that's been established pursuant to the law passed by Congress to be there for your exclusive benefit or you can gamble on getting them in the future if the debtor has future cash flows available, in fact, to pay them; which would you like to have? I think the response of the retirees would be

clear, unless we might conclude that the retirees are imbued with this altruistic view, as well, and would rather give up the safety of those in order to support the future of the funds and the other sociological purposes served by the union.

But, nonetheless, the response of the union was we cannot consider that because Sunnyside is mandated by 26 USC 9711 to provide these benefits. So, this isn't something that we can negotiate. And, if that's true, I think that is good cause. It's kind of a back door way of recognizing that the obligations imposed by the Coal Act probably do play within the context of 1114. 1114 defines under 1114(a), "retiree benefits", "any payment to any purpose for medical, surgical, or hospital care under any plan, fund, or program maintained or established in whole or in part by the debtor prior to filing the petition and commencing a case under this Title."

Is the Coal Act obligation, under 9711(a) of the Internal Revenue Code, a plan, fund, or program maintained or established in whole or in part by the debtor; is, I suppose, one question. Maybe one answer is that, at least as to the date of the filing of the Act, the obligation to pay was not evidenced under Section 9711, but was evidenced under the voluntary agreement, which is what Mr. Gillman is kind of arguing. And, that, in fact, is true.

The second question is if it is a plan, fund, or program maintained to establish in whole or in part by the debtor prior to filing a petition commencing this Chapter 11, can it be modified under 1114? Well, I suppose there's an interim question. And, that is the question of whether, if it is one of those things, does 9711 impose a present obligation on the debtor to provide retiree benefits? And, that, of course, focuses on the fact that coverage under 9711 is to be provided for as long as the last signatory operator remains in business. And, Congress has defined for us what business means. In the simplest terms, business means business. That's what 9701(c)(7) says; "For purposes of this chapter, a person shall be considered to be in business if such person conducts business." Not very helpful. "Whether or not in the coal industry"--well, that does help clarify things a little bit--"conducts or derives revenues from any business activity."

The legislative history certainly indicates that Congress viewed the language that it was using as being as all inclusive as they thought they could make it. I think part of the history behind this kind of legislation stems from a view that these persons who are retirees spent some significant portion of their lives in developing the assets working at Sunnyside and its predecessor mining the coal. And then, Sunnyside shuts down and takes the fruits of those

labors, the coal that's sitting there, and sells it and that it ought not to profit at the expense of those who produced it. And, there is a bit of that here; not, let me hasten to say, maliciously. But, just the reality that when Sunnyside sat down there remained some stores of mined coal on the property and it is used employees, paid for in accordance and treated in accordance with the terms of the collective bargaining agreement, to clean that coal and sell it.

The argument that the debtor makes is that business activity should be read to mean net income oriented; business activity that is meant to produce a profit. And, indeed, that is the focus of the Carpenter Town opinion. But, 9701 doesn't talk about profit; it talks about revenues, revenue from any business activity conducts--conducts any business activity. It doesn't even have to be revenue generating if it conducts a business activity. Well, what's a business activity? What was the business activities of this debtor before it shut the mine down? Well, some of those certainly were mining coal. And, it's not doing that any more. But, in connection with that business activity and with the fact that it owned coal mine properties, it was also engaging constantly in environmental care and reclamation, in maintenance and repair, in liquidation of excess equipment, in paying its creditors. This debtor has a business obligation to wind up its affairs, liquidate its assets, pay

its creditors. If it had enough money to pay its obligations on a current basis outside of this Court, but desired to terminate all operations, that's what it would do.

The other opinion of Carpenter Town is a little unclear. We do know in that case that the debtor had finished all of those things, the reclamation and the sale of its assets. It held some cash which it was going to pay. That's all it had left to do. And, perhaps, that's not the conduct of a business activity. It was not generating revenue other than maybe some interest on the monies it was holding, but the Judge doesn't tell us. And, it's not clear --to me, at least, in reading the opinion--whether the claim for contributions under the Coal Act was being made on a basis that reached back to the period of time during which the debtor had been in the process of reclamation and liquidation; although the inference certainly is that that was the case, but it isn't abundantly clear that that was true. But, nonetheless, I don't agree with the Judge's focus in that case where he makes the immediate quantum leap from revenue to profits because that's simply not what 9702 is about.

So, here, we know that the debtor has post-petition liquidated remaining stocks of coal inventory and continues to do so to some limited extent, but does continue to do so which certainly is a business activity even though not one

calculated to put this debtor back into the mining business. But, it is a business activity. And, it continues to carry on all of the other accouterments of this kind of a business short of actually going down into the mine and taking out coal. So, I have to conclude that Sunnyside is at the present time conducting or deriving revenue from a business activity and, therefore, is subject to the mandate of 9711(a) to provide continuing retiree coverage as required by the statute.

And then, the question is can this Court, under 1114, permit this debtor to terminate its statutory obligation to provide these benefits? If it can, then the position of the union in categorically refusing to sit down and discuss this was not with good cause. But, if it cannot, then the position with the union, I think, must be viewed to be with good cause. So, it's a long way around to considering the impact of the Coal Act within the context of 1114.

1114 was outstanding and in effect when Congress addressed itself to the Coal Act. Mr. Gillman suggests that the institutional memory of Congress, therefore, should have remembered what it had done in 1114 shortly before the Coal Act and have acted to have intelligently told us what the impact was going to be. And, having failed to explicitly remove the Coal Act from the long arm of 1114, the Court

should conclude that it can, under 1114, terminate that obligation.

I understand that argument. It's one of the problems that haunts us continually in bankruptcy. This enactment of special legislation, either within or without the Bankruptcy Code, to solve a specific problem without much attention being given to what kind of damage it does to the legislative scenario in another area. And, we are sometimes accused, those of us who sit on a specialized Court, of having a kind of judicial myopia where we're unable to see the broader scope of other kinds of remedial legislation or to apply it in the context of a bankruptcy proceeding because we are too focused on the remedial effects and desires of implementing the bankruptcy system. I think the reality is that we have to plead guilty to that charge, all of us, at least to some degree at some time.

9711 is unequivocal. It is unequivocal. "The operator shall continue to provide these retiree health benefits, so long as the operator remains in business." It's a statutory obligation. It is not contractual. It is measured, it is true, by contractual measure, but it is statutory. 1114 permits, if applied to modify 9711, the union to do something that clearly it could not do outside the context of bankruptcy which is to come to a voluntary agreement with an employer to reduce retiree benefits below

the levels provided for by the plan in existence on January 1, 1992. 1114 tells us that we don't get to this point of having a hearing to determine whether the company ought to be allowed to reduce the benefits if the authorized representative and the company have agreed.

I don't think that 9711 could have been made much clearer by Congress. Even if the Court makes the leap to determine that it is or constitutes a plan, fund, or a program maintained or established in whole or in part by the debtor, I don't think Congress could have been much clearer in 9711 than to send a message to say it doesn't make any difference where you are or what you're doing, whether you're a debtor-in-possession, in what kind of a business you are, or anything else; so long as you remain in business, you shall pay these health benefits unless it's determined that it isn't necessary. And, I am unable to find my way to reach a conclusion that says notwithstanding that explicit language that is enacted after--I can ignore it until Sunnyside--others perhaps could do that. Perhaps, a higher Court can find that it--this Court under 1114 can't--I will certainly credit the parties--

The reality is that it is a point subject to argument, but you are here asking for my judgment in this proceeding and that's what you get. I'm sure that this problem will haunt other Courts, but for today the judgment

that we have to deal with is mine based on the case that is in front of me. I must conclude that the Coal Act does require Sunnyside to provide the ongoing benefits, health care benefits, to the retirees as mandated by 9711 and, therefore, the union as the authorized representative had good cause to not bargain on the proposal of the debtor to terminate those benefits. And, because, therefore, the Court has concluded that the debtor has failed to make the showings required by 1114(g)(1) and 1114(g)(2), the application of the debtor to terminate the retiree benefits at this time must be denied.

I thank counsel for bringing this wonderfully interesting problem to this Court. We'll be in recess.

(Whereupon, at 11:40 a.m., the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

August 2, 1994

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